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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent	:	
	:	
v.	:	
	:	
RODNEY K. STARKS,	:	Case No. 16609
	:	
Defendant-Appellant	:	

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BRIEF OF APPELLANT

This is an appeal from a conviction for the offense of  
Manslaughter, a second degree felony, in the Third Judicial District  
Court in and for Salt Lake County, State of Utah, the Honorable  
Ernest F. Baldwin, Jr., Judge, presiding.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff-Respondent

v.

RODNEY K. STARKS,

Defendant-Appellant

Case No. 16609

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BRIEF OF APPELLANT

This is an appeal from a conviction for the offense of Manslaughter, a second degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge, presiding.

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## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF THE FACTS . . . . .	2
ARGUMENT	
<u>POINT I: THE TRIAL COURT ERRED IN SUBMITTING SECTION 2 (a) OF INSTRUCTION NO. 22 TO THE JURY WHERE THE INSTRUCTION WAS UNWARRANTED BY THE FACTS OF THE CASE. . . . .</u>	6
<u>POINT II: THE TRIAL COURT ERRED IN REFUSING TO SUBMIT TO THE JURY APPELLANT'S PROPOSED INSTRUCTION (R.72) AS A CORRECT STATEMENT OF THE LAW IN UTAH. . . . .</u>	16
<u>POINT III: THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON REASONABLE ALTERNATIVE HYPOTHESIS . . . . .</u>	22
<u>POINT IV: THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE CUMULATIVE ERROR COMMITTED BY THE TRIAL COURT . . . . .</u>	24
CONCLUSION . . . . .	25

## CASES CITED

Baldwin v. State, 538 S.W. 2d 615 (Tex. 1976) . . . . .	19
Bustamonte v. People, 401 P.2d 597 (Col. 1965) . . . . .	9
Cullin v. State, 565 P.2d 445 (Wyo. 1977) . . . . .	8,9
Flowers v. State, 247 S.E. 2d 217 (Ga. 1978) . . . . .	15
Gassett v. State, 587 SW 2d 695 (Tex. 1979) . . . . .	9
King v. State, 232 SE 2d 236 (Ga. 1977) . . . . .	11
McCandless v. State, 42 Tex. Cr. R. 58, 64-65, 57 S.W. 672 (1900) . . . . .	14

(Continued)

Page

People v. Bush, 148 Cal. Rptr. 430 (1978) . . . . .	19
People v. Flores, . . . . .	18
People v. Townes, 218 NW 2d 136 (Mich 1974) . . . . .	12
Ramsey v. State, 558 P.2d 1179 (Okla. Cr. 1977) . . . . .	20
Rice v. State, 567 P.2d 525 (Okla. Cr. 1977) . . . . .	20
State v. Bender, 581 P.2d 1019 (1978) . . . . .	23
State v. Bristol, 84 P.2d 757 (Wyo. 1938) . . . . .	12
State v. Canedo, 563 P.2d 315 (Ariz. App. 1977) . . . . .	17
State v. Eddington, 386 P.2d 20 (Ariz. 1963) . . . . .	22
State v. Fort, 572 P.2d 1387 (Utah 1977) . . . . .	23
State v. Garcia, 335 P.2d 57 (Utah 1960) . . . . .	23
State v. Hall, 228 S.E. 2d 637 (N.C. 1976) . . . . .	21
State v. Minnish, 560 P.2d 340 (1977) . . . . .	18
State v. Rummage, 185 S.E. 2d 221 (N.C. 1971) . . . . .	21
State v. Shoenfeld, 545 P.2d 193 (Utah 1976) . . . . .	10
State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955) . . . . .	25
State v. Turner, 79 P.2d 46 (1938) . . . . .	11
Trujillo v. People, 372 P.2d 86 (Col. 1962) . . . . .	14
Williams v. State, 513 P.2d 335 (Okla. Cr. 1973) . . . . .	9

#### STATUTES CITED

Utah Code Ann. §76-2-402 (1953 as amended) . . . . .	7
Utah Code Ann. §76-5-203 (1953 as amended) . . . . .	1
Utah Code Ann. §76-5-205 (1953 as amended) . . . . .	1

(Continued)

Page

OTHER AUTHORITIES CITED

1 ALR 3d 571, §3 . . . . .	17
53 Am. Jur., Trial §639, p. 494 . . . . .	8
40 C.J.S. §119 Homicide, p. 992 . . . . .	11,16
40 C.J.S. §272 Homicide, p. 1221 . . . . .	18
40 C.J.S. §275 Homicide, p. 1230 . . . . .	18
41 C.J.S. §378 Homicide, p. 171 . . . . .	8
41 C.J.S. §383 Homicide, p. 187. . . . .	8

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for the offense of Manslaughter, a Second Degree Felony, in violation of Utah Code Ann. §76-5-205 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant, RODNEY K. STARKS, was charged by Information with the offense of Criminal Homicide, Murder in the Second Degree, in violation of Utah Code Ann. §76-5-203 (1953 as amended). On the 27th of June, 1979, the appellant was convicted of Manslaughter, a lesser included offense. On July 13, 1979, the appellant was sentenced to an indeterminate term of 1 to 15 years in the Utah State Prison.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment rendered below and a remand of the case to the Third Judicial District Court for a new trial.

## STATEMENT OF THE FACTS

On September 29, 1978, police officers were dispatched to the area of 250 West and 3300 South to investigate a shooting. They found Joseph Boykin lying in the middle of 33rd South approximately 400 or more feet down the road from the parking lot adjacent to the Golden Fleece Bar. (T.12) An establishment known as the Touch of Class Massage Parlor was downstairs from the Golden Fleece Bar, and Kim's Massage Parlor was around the corner on 3rd West and 3200 South. (T.20)

To develop the circumstances surrounding the shooting, the prosecution called Kaylene Griggs to the stand. She was an ex-girlfriend of the deceased, and a friend of the appellant through her employment with him at Kim's Massage Parlor. (T.28) On the evening of the shooting she had arranged to "perm" the appellant's hair after her shift as a dancer at the Golden Fleece Bar. (T.27) She testified that when appellant called her from downstairs to inform her he was ready to pick her up, she asked if he would come up and wait by the door because Joe Boykin had been bothering her in the bar. (T.31) The appellant came upstairs, and when he and Kaylene proceeded out to the car, Joe followed. (T.34) Kaylene stated that,



despite her objections, Joe insisted that she talk with him. She said Joe also talked about running into a friend who wanted to borrow his gun, but he said he felt like he was going to need it. (T.53) Meanwhile, Peter Isaacson approached the three and attempted a friendly conversation, but left shortly thereafter when he saw that things were tense. (T.35) Joe was growing angry with Kaylene's refusal to go with him, and appellant was trying to calm him down. When Joe grabbed Kaylene's arm and pulled his fist back, appellant stepped in and put his arm up toward him. (T.35,36) Kaylene then stooped down to place her suitcase and drink inside the car, and several seconds later heard a noise like shots. (T.37) She said when she looked up she saw Joe running in front of the appellant. (T.37)

On cross-examination, counsel asked Kaylene if appellant had ever seen Joe violent, and she answered that he had. She testified that one evening at the Black Bull with appellant and Al Cortez present, Joe dragged her outside and beat her up. (T.43) Additionally, she had told the appellant about two experiences she had had with Joe. The first involved an alleged "ride" that Kaylene took with Joe which led to Joe's forcing sex on Kaylene at his house. (T.46) The second involved Joe's dragging Kaylene from a neighbor's house, and the observation by two men who gave chase that they thought Joe had a gun. (T.48)

Peter Isaacson was called by the State and testified to substantially the same facts as Kaylene. He said that when he walked over to say hello, Joe appeared to be angry with him, and acted as if he wanted to fight. (T.113) Peter walked away when the appellant advised him that it would be better if he just left, but later looked back to see Joe grabbing Kaylene's arm and appellant removing it. He said the appellant and Joe backed off, with Joe taking the offensive as if he wanted to fight. (T.117) A volley of shots rang out, and both ran, with Joe in front and the appellant behind. (T.121) The testimony established that the gun used in the shooting belonged to a female employee of Al Cortez, the appellant's boss. Al had taken the gun from his employee for her protection, and then placed it under the seat of the car that he had loaned appellant on the night of the crime in question. (T.92)

Dr. Serge Moore testified for the State in order to establish the nature of the wounds received by the victim and the cause of death. He said that there were four gunshot wounds, but that the one which caused Boykin's death was the bullet which entered the left thigh, and coursed from left to right injuring the femoral artery. (T.83) Dr. Moore stated that the fatal shot and also the shot to the right wrist area could only have been inflicted if the victim was facing the assailant, or turned slightly sideways. (T.83) Moore also testified that such conclusion, along with the defendant's claim that the victim had his hand in his pocket, were consistent with the angles at which the two shots entered the body. (T.83)

The appellant took the stand and first testified about his observations and knowledge of Joe's violent acts. He described the incident at the Black Bull, Joe's alleged rape of Kaylene, and Joe's threats to Kaylene's neighbors as he abducted her. (T.166, 174, 177) Additionally, the appellant stated that Al Cortez told him on one occasion of Joe's possession of a gun. (T.175) The appellant then related the sequence of events on the evening of the 29th in substantially the same fashion as the State's witnesses. He said that when he arrived to pick up Kaylene, he noticed Joe's car in the parking lot, and so armed himself and called her from downstairs. (T. 180) When Kaylene and the appellant walked out of the bar, Joe followed behind, and the appellant heard him say something about needing his gun. (T.183) The appellant stated that upon reaching the car, he ushered Kaylene into it as Joe was urging her to come with him and talk. (T.184) When appellant was halfway around the car, Joe had opened the door and was pulling Kaylene out. (T.185) Appellant returned and loosed Kaylene from Joe, all the while attempting to calm Joe down and denying that Kaylene was his girl. (T.86) When Peter came over, Joe made aggressive moves toward Peter, whereupon appellant advised Peter to leave. (T.190) Peter left, and as Kaylene attempted to get into the car again, Joe grabbed her arm and drew his fist back in a position to strike. (T.191) Appellant testified that he grabbed Kaylene's other arm, and when Joe stuck his hand in his pocket and told appellant not to go in his pocket, appellant panicked

and shot at the hand in fear that it held a gun. (T.193) He said at first the gun wouldn't shoot, but when he got it working he shot two to three times at Joe's hand as Joe was "jumping around". (T.194) During this time Joe was positioned kind of sideways with his right hand in his pocket. Joe started "pedaling backward" and when he reached the sidewalk, appellant chased him out of the parking lot, firing in his direction with no realization that he had ever hit him. (T.197) Joe ran across the street, stumbled on the sidewalk and fell, then got up, took his shirt off and ran down the middle of the street toward the railroad tracks. (T.198) Shortly thereafter, the appellant went to Kim's Massage Parlor, threw the gun on the floor, and walked back outside where he was arrested. (T.200)

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN SUBMITTING SECTION 2(a) OF INSTRUCTION NO. 22 TO THE JURY WHERE THE INSTRUCTION WAS UNWARRANTED BY THE FACTS OF THE CASE.

Appellant argues that he shot the victim in self-defense. Such a defense was established not only by the state's witnesses but by the physical evidence. Both Kaylene Griggs and Peter Isaacson testified that Joe Boykin attempted to forcefully abduct Kaylene, and when the appellant tried to protect her, Boykin responded with aggressive, fighting actions. Moreover, Joe's prior violent acts towards Kaylene, as well as his alleged possession of a gun, were known by the appellant. The testimony of the State's witness, Dr. Sergei Moore, also supported appellant's

claim of self-defense. The fatal shot was fired while the victim was slightly turned and facing the appellant, and while he had his hand in his pocket. This was entirely consistent with the appellant's testimony that he shot at Boykin as he turned slightly and held his hand in his pocket. Appellant's right to defend himself must be judged when the fatal shot was fired, and the victim's actions at that point clearly indicated the possession of a gun. Appellant was justified in shooting for fear a concealed weapon in the victim's pocket might be used against him.

The trial court submitted an instruction on self-defense to the jury, but included an instruction on "aggression" and "mutual combat" which appellant contends prejudiced him in his claim of self-defense. The court charged the jury that appellant was not justified in using force as allowed under subsection (1), Utah Code Ann. §76-2-402 (1953 as amended), if he was the aggressor or engaged in combat by agreement under subsection (2)(c). Those sections provide:

(1) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony.

(2) A person is not justified in using force under the circumstances specified in paragraph one of this section if he:

(c) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.

Appellant contends that the inclusion of subsection (2)(c) in the Instruction was error as it is inapplicable to the facts of the instant case.

It is axiomatic that the defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such an instruction. See State v. Johnson, 185 P.2d 738, at 743 (Utah 1947). And as a general rule it is not erroneous for the court to instruct the jury by defining the crime in the language of the statute if the jury is not confused or misled thereby. See 53 Am. Jur. Trial §639, p. 494. But a charge should not be given unless the facts in the case justify it. Since a charge on mutual combat, or one on aggression and provoking the difficulty, is a limitation on the right of self-defense, such a charge is erroneous where it is not supported by the issues and evidence in the case. See 41 C.J.S. §378 Homicide, p. 171, and 41 C.J.S. §383 Homicide, p. 187.

Thus, in Cullin v. State, 565 P.2d 445 (Wyo. 1977), while an instruction limiting the claim of self-defense (if the jury found that the defendant provoked the difficulty or was the aggressor) was approved, it was declared that it is the court's obligation initially to determine whether there is evidence before the jury from which it could infer that the defendant

the aggressor so as to be deprived of the right of self-defense. If not, the court emphasized, "[t]he instruction cannot be given as a matter of course in every case involving a claim of self-defense." Id at 451. In Cullin the court was justified in instructing the jury as it did in light of the defendant's threats to kill, her overpowering jealousy, and her arming herself and searching out the victim.

Other courts have recognized the same principle and add that if a statutory instruction does not fit a particular case, other supplementary instructions must be given to fairly state a defendant's position. See Bustamonte v. People, 401 P.2d 597 (Col. 1965). Thus, in Williams v. State, 513 P.2d 335 (Okla. Cr. 1973), the defendant's conviction of murder with a firearm was reversed for the trial court's failure, inter alia, to define "aggressor" in connection with its instruction on self-defense. The court charged the jury that it could acquit the defendant unless he entered into the difficulty voluntarily or was the aggressor, yet failed to define what constitutes an "aggressor". The court concluded that this failure was fatal, noting that it could only cause confusion in the minds of the jurors;

It is prejudicial to a defendant to give an instruction on the issue of self-defense which tends to describe him as an aggressor without further definition of aggression and the aggressive acts that would deprive him of self-defense. Id at 340.

Similarly, in Gassett v. State, 587 SW 2d 695 (Tex. 1979) the court reversed a murder conviction, holding that the evidence

introduced was sufficient to require additional instruction on the accused's right to carry arms to the scene of the difficulty. While evidence supported the trial court's instruction that the defendant could not claim self-defense if the jury found that he provoked the difficulty, the court concluded that, under the facts, the supplemental instruction was necessary to ameliorate the limitation imposed on the defendant's claim of self-defense.

Appellant contends that even the inclusion of a supplemental instruction informing the jury of the nature and quality of any acts which would operate to limit his right of self-defense would not rectify the trial court's error. He claims he was not an "aggressor" as defined by the court in State v. Shoenfeld, 545 P.2d 193 (Ut. 1976). In that case the Utah Supreme Court concluded that the instructions given by the lower court were generally in accord with Utah's law, thereby sanctioning the definition of aggressor as given by the trial judge;

An aggressor is one who willingly and knowingly initially provokes a combat or does acts of such a nature as would ordinarily lead to combat. A person can also be classified as an aggressor if he leaves the scene of a quarrel, arms himself and then returns to the scene and renews the quarrel. Id at 196.

Generally, some of the acts that may ordinarily lead to combat have been held to be abusive or insulting language, certain gestures, the making or causing of assault or attack, commission of crime, trespass or resistance to trespass, criminal intercourse with the wife or daughter of another, and



in some instances the carrying of arms. See 40 C.J.S. §119, Homicide, p. 992. Illustrative is the Utah case of State v. Turner, 79 P.2d 46 (1938), wherein the court concluded that there was sufficient evidence to justify an instruction to the jury that they could find the defendant to be the aggressor. In that case an argument developed over the payment of a bill in a restaurant, and when a customer insulted the owner (the defendant), the defendant responded, "You goddamn crazy son-of-a-bitch, no man can come in my place of business and insult me like that." Id at 48. The defendant then exited to the kitchen, and returned first with a knife, and then with a gun. The court stated that the quarrel became menacing only when defendant uttered his threat and took up the knife, and found this evidence sufficient to justify a jury finding that the defendant was the aggressor.

Similarly, in King v. State, 232 SE 2d 236 (Ga. 1977), the defendant urged that there was insufficient evidence to authorize a charge that a person is not justified in using force if he initially provokes the use of force against himself. There defendant's brother had argued with the deceased, and defendant, though not involved, followed deceased into his house. He was unwelcome, and when asked to leave, persisted in his entrance. Both deceased and his companion, a woman, shot at defendant, between his legs and behind him, whereupon he left. He returned the following day and shot and killed deceased. The court concluded that the instruction given was proper where the defendant armed himself with a shotgun with the purpose of shooting the deceased ~~when he returned to the home of the~~

deceased with the gun visible, and threatened to shoot the deceased.

By contrast, in the following cases the courts refused to limit the defendant's claim of self-defense by an instruction on aggression where the facts were not supportive of such a charge. In State v. Bristol, 84 P.2d 757 (Wyo. 1938) the defendant assisted in ejecting one Skogerson from a barroom and later encountered him in a cafe. Testimony indicated that the defendant paused briefly at a booth occupied by Skogerson and others, and momentarily "glared" at one of the witnesses. An affray ensued, initiated by Skogerson's hitting Bristol in the face, and culminating eventually in a shot which killed Skogerson. The trial court instructed the jury that one who is aggressor or provokes a difficulty cannot invoke the right of self-defense, to which defendant excepted. Despite the facts that the defendant armed himself, went where Skogerson was, and "glared" at someone, the reviewing court disapproved the instruction. The court observed that "trivial words or slight provocation, reasonably calculated and probably not designed to bring about immediate fatal encounter, have never been deemed sufficient to deprive a defendant of his right of self-defense." Id at 766.

Similarly, in the case of People v. Townes, 218 NW 2d 136 (Mich. 1974), the court found erroneous a self-defense instruction premised on the assumption that the jury could reasonably infer that the defendant was the aggressor. In the Townes case, defendant entered a tire store belonging to the deceased and loudly accused an employee of dating his wife.

When the deceased intervened and asked defendant to leave his store, defendant refused. Deceased reappeared shortly thereafter with a pistol at his side and reentered the defendant to leave. Defendant backed out of the store, and from there the evidence was in conflict as to whether defendant re-entered the store and shot deceased, or whether deceased made a sudden movement which caused defendant to shoot in what he believed to be self-defense. In any event, the court concluded that the lower court was unjustified in charging the jury that the defendant could not claim self-defense if he was found to be an aggressor in the difficulty. The trial court erroneously assumed that if the defendant was at fault in provoking a disturbance in the tire store, he was then accountable as an aggressor for any response to his conduct. The evidence did not support the inference that defendant's actions were designed to provoke a difficulty with deceased so that defendant could harm him, nor was there any indication that deceased intervened with the intention of protecting his person. The only reasonable conclusion that could be drawn, the court observed, was that deceased sought to protect his property, and a threat to property is not a legally sufficient provocation to render the defendant an aggressor. The court concluded that the erroneous instruction was clearly prejudicial to the defendant where it could literally foreclose his claim of self-defense;

"[W]henver a judge, by his charge, proposes to deprive a defendant of his right of self-defense, he must be enabled to lay his hand on the facts which justify him in doing so; and, unless he can, he should abstain from giving a charge of this character, because, however groundless the charge may be, coming as it does from the court, it is calculated to make the jury believe that, in the opinion of the judge, there was evidence tending to show that appellant brought on the difficulty for the purpose of slaying his adversary; and consequently such an instruction, not authorized by the testimony, is calculated to injure or impair the rights of the defendant." McCandless v. State, 42 Tex. Cr. R. 58, 64-65, 57 S.W. 672 (1900).

Appellant contends further that the court's limitation on his claim of self-defense cannot stand on the theory of mutual combat in the absence of facts to support such a charge. Generally, mutual combat requires a mutual intent to fight, which is manifested by acts and conduct of the persons involved, and circumstances surrounding the combat, including those leading up to the actual fight itself. See 40 C.J.S. §122 Homicide, p. 997. According to the Utah Supreme Court in State v. Johnson, 185 P.2d 738, at 742 (1947), "combat" is a fight, duel, or struggle for supremacy between at least two persons. The court further states that "it [combat] savors of not only the intent to participate, but also the actual participation by both parties. It cannot be enlarged to include a one-sided attack on an innocent victim. The acts of one man can never constitute a "combat". Id.

Thus, in the case of Trujillo v. People, 372 P.2d 86 (Col. 1962), the court found that even where defendant and deceased went to the scene of the homicide to engage in a fight, the injuries resulting in death were not inflicted by

defendant during such combat. Although the altercation began as a mutual combat, it ended when defendant continued to kick the deceased after he was knocked to the ground. Since the kicks were the cause of death, an instruction on mutual combat was held to be unwarranted. Similarly, in Flowers v. State, 247 S.E. 2d 217 (Ga. 1978), the appellant and victim had engaged in a game of "mercy" whereby each tried to out-grip the other's hand in a showdown of strength. The contest evolved into a fist fight, and culminated in a shotgun blast which killed the victim. The court found that there was no evidence showing an agreement between the men to fight with weapons. Concluding that the charge to the jury on mutual combat was reversible error the court observed; "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." Id at 218.

There is no evidence in the instant case that the appellant voluntarily participated in a contest or mutual combat for purposes other than protection. There is no manifestation of agreement or intent to fight; to the contrary, there is every indication that appellant was attempting to avoid a confrontation with Joe. He called Kaylene from downstairs, said nothing to Joe as he ushered Kaylene out of the bar, and attempted for a substantial period of time to calm Joe down. Nor is there any evidence that the appellant was an aggressor in the incident. He did not willingly and knowingly provoke a combat, nor did he engage in acts that would ordinarily lead to combat.

545 P.2d, at 196. No evidence appeared at trial that appellant used abusive or insulting language, that he caused an assault, that he committed a crime, or that he threatened to kill Joe. Appellant was carrying a gun, but not for purposes of brandishing it in a threatening manner. He armed himself in anticipation of a possible attack, and his right to exercise self-defense was preserved where he did nothing else or nothing wrongful to provoke or bring on a difficulty. See 40 C.J.S. §119 Homicide p. 992. The conclusion is clear that appellant was not the aggressor nor did he engage in combat by agreement. Subsection of Instruction No. 22 is simply not applicable to the facts of the instant case, and the trial court erred in submitting it to the jury.

## POINT II

### THE TRIAL COURT ERRED IN REFUSING TO SUBMIT TO THE JURY APPELLANT'S PROPOSED INSTRUCTION (R.72) AS A CORRECT STATEMENT OF THE LAW IN UTAH.

To buttress his claim of self-defense, which was amply supported by testimony and physical evidence offered by the State, appellant testified regarding his knowledge of Boykin's propensity for violence. He described three instances he had either witnessed or learned about through Kaylene Griggs. Kaylene testified for the State and verified the appellant's knowledge of these incidents. Appellant contends that since his knowledge of the victim's previous violent acts bears directly on the reasonableness of his action in self-defense, he was entitled to an instruction to that effect. He properly excepted

to the trial court's failure to give his proposed Instruction No. \_\_\_\_\_ (R.72) which reads;

INSTRUCTION NO. \_\_\_\_\_

You are instructed that all evidence known to RODNEY K. STARKS, on September 29, 1978 concerning the reputation and specific acts of violence and aggressiveness of Joseph L. Boykin is relevant to your determination of Rodney K. Starks' state of mind and the reasonableness of his conduct at the time of this incident.

On the basis of this evidence, considered in conjunction with the rest of the evidence in this case, if you find that there is a reasonable doubt that Rodney K. Starks committed the offense, then you must find Rodney K. Starks not guilty.

As a general rule, the defendant, after laying a proper foundation by evidence tending to show that he committed a homicide in self-defense, may introduce evidence of the violent and turbulent character of the deceased. See 1 ALR 3d 571, §3. The reputation of the deceased as a dangerous and turbulent person is offered for the purpose of determining who was the aggressor, or for buttressing the reasonableness of the defendant's apprehension of imminent danger. See State v. Canedo, 563 P.2d 315 (Ariz. App. 1977). Additionally, specific acts of violence toward third persons known or observed by the defendant prior to the homicide may be introduced to show that the decedent was of a violent and turbulent disposition. Id. Specific acts, unknown by the defendant and directed toward third persons, as would reflect upon the conduct or motive of the parties at

the time of the affray are admissable in order to show who was the aggressor. Id. And threats actually communicated to the defendant are admissable to show who was the aggressor and to show reasonable apprehension on the part of the defendant. Id. See also 40 C.J.S. §272 Homicide, p. 1221, and 40 C.J.S. §275 Homicide, p. 1230.

Thus, in People v. Flores, a conviction of second degree murder was reversed where the trial court refused to admit testimony that the victim had previously assaulted the defendant's brother-in-law with an iron reinforcing bar in the presence of the defendant. The court held that such testimony was admissable in support of the defendant's theory of self-defense on the issue of the defendant's state of mind at the time of the stabbing. And in the Utah case of State v. Minnish, 560 P.2d 340 (1977), while the court held that no error occurred in excluding evidence of the victim's propensity for violence and aggressiveness, it nevertheless recognized the general rule that evidence pertaining to the character of the victim can be admitted where the defendant shows he acted in self-defense.

In the present case, the trial court properly determined that evidence of the deceased's specific and violent acts toward third persons was admissable, and allowed both Kaylene and appellant to testify regarding specific incidents of Joe's violent acts against Kaylene. Kaylene also testified that she was frightened of Joe as a result of threats he had made to her and things he had done to her in the past. (T.50) On: 12



this evidence was admitted, the appellant was entitled to an instruction on it to support his theory of self-defense.

Courts have focussed on why such an instruction is necessary, particularly where evidence in a case is closely balanced. In People v. Bush, 148 Cal. Rptr. 430 (1978), the court held that the trial court erred in refusing to give defendant's proffered instruction that one who has received threats against her person by another is justified in acting more quickly and taking harsher measures for her own protection than a person who has not received such threats. The court explained that while the instructions given by the trial court did not necessarily exclude the prior threats from the jury's consideration, nevertheless the instructional reference to "present" and "imminent" danger might divert the jury's attention from the previous threats. Hence, failure to instruct on prior threats required reversal in view of the closeness of the case and the conflicting nature of the evidence.

Courts have not given a hypertechnical construction to the requirement that the trial court instruct as to the victim's propensity for violence and turbulence. But they have required that the substance of the requested instruction be contained in the instruction actually given. Thus, in Baldwin v. State, 538 S.W. 2d 615 (Tex. 1976) where the defendant seriously injured the victim by hitting him over the head with a pipe, the court held there was no error in the trial court's failure to give the defendant's specially requested charge on self-defense

based on threats of the victim to kill the defendant. Instead, the instruction which was actually given by the trial court, in substance charging that the jury could consider the words or conduct of the victim in determining whether the appellee acted reasonably, was held to be sufficient. Similarly, in Rice v. State, 567 P.2d 525 (Okla. Cr. 1977), where defendant shot and killed her husband, the court rejected the defendant's contention that the trial court erred in refusing to give her proffered instructions that the jury could consider evidence of the victim's communicated threats and threats to kill as showing the reasonableness of the defendant's acts. The court was of the opinion that the instructions actually given by the trial court adequately covered the area of law;

"If you believe from the evidence that the defendant had received information that the deceased had, prior to the difficulty in which he lost his life, made threats of a violent nature toward and about the defendant, then you may take such fact into consideration . . . in determining whether . . . the defendant . . . believed her life was in danger." Id at 529-30  
(Emphasis Supplied)

The court reached a similar conclusion in Ramsey v. State, 558 P.2d 1179 (Okla. Cr. 1977), finding that the defendant's proffered instruction which included a paragraph placing undue emphasis upon the propensity of the victim to be violent was unnecessary. The court observed, however, that the instructions actually given allowed the jury to consider the acts of the deceased in determining the defendant's justification in shooting him. In the instant case, no instruction whatsoever allowed the jury to consider violent acts of the deceased in assessing the

reasonableness of the defendant's behavior. The trial court narrowed the jury's focus and allowed them only to consider whether force was necessary to defend against the victim's imminent use of unlawful force. As given, the instructions unduly limited the viability of the claim of self-defense, and was therefore prejudicial to the appellant.

A case directly on point and supportive of appellant's position is State v. Hall, 228 S.E. 2d 637 (N.C. 1976). In that case the defendant and one Jamieson engaged in a fight early in the afternoon, and twenty or thirty minutes later, while Jamieson was standing on the side of a street talking with friends, the defendant allegedly drove up and shot him in the leg with a rifle. Defendant offered evidence tending to show that Jamieson often carried a pistol, had been arrested for possessing two pounds of marijuana and had accused defendant of telling the police, and had threatened to kill the defendant. On redirect examination defendant also testified that Jamieson told him that he shot at somebody with his pistol. Defendant assigned as error the trial court's failure to correlate the evidence indicating that Jamieson was a dangerous and violent man with defendant's plea of self-defense. The Court of Appeals agreed, relying on State v. Rummage, 185 S.E. 2d 221 (N.C. 1971), that where there is plenary evidence that deceased was a dangerous and violent man, the trial judge should charge as to the bearing the deceased's reputation as a violent man might have had on defendant's reasonable apprehension of death or great bodily harm at the time of the attack. Thus, it was

error for the trial court to refuse to correlate, in its instructions to the jury, the evidence indicating that Jamieson was a dangerous and violent man.

In State v. Eddington, 386 P.2d 20 (Ariz. 1963), the court recognized the soundness of such a conclusion, but held that in the absence of any evidence indicating that defendant knew of the violent character of the victim at the time of the shooting the court did not err in refusing to give a charge that the jury could consider the victim's dangerous and turbulent character.

In the instant case, Rodney Starks was aware of the victim's propensity for violence. Both Kaylene and appellant testified to appellant's knowledge of three particular incidents manifesting Joe's turbulent and violent character. The appellant was entitled to an instruction that the jury could consider these incidents as they bore on the reasonableness of his appraisal of the victim at the time of the difficulty. Failure to so instruct was prejudicial error.

### POINT III

#### THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON REASONABLE ALTERNATIVE HYPOTHESIS.

Appellant also excepted to the Court's failure to give an instruction on what is commonly referred to as reasonable alternative hypothesis (R.52,53, Proposed Instruction No. \_\_\_\_\_)

To warrant you in convicting the defendant, the evidence must to your minds exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.

Recent Utah cases have clarified the circumstances under which the defendant is entitled to instruction on reasonable alternative hypothesis. In State v. Bender, 581 P.2d 1019 (1978), this court observed;

It has long been the law in this jurisdiction that the giving of such an instruction (reasonable alternative hypothesis) is neither appropriate nor required unless the proof of a material issue is based solely upon circumstantial evidence. [citing State v. Fort, 572 P.2d 1387 (Utah 1977), State v. Garcia, 335 P.2d 57 (Utah 1960)]

The policy behind instructing the jury on reasonable alternative hypothesis lies in protecting the rights of the accused. It emphasizes to the jury that they must be convinced by the evidence presented that the defendant is guilty of the offense charged beyond a reasonable doubt.

For a public offense to be committed in the State of Utah, there must be a joint union of act and intent. A necessary element of the crime of Criminal Homicide, Murder in the Second Degree, is that the defendant intended to cause the death of another. In the instant case, that critical element of guilt is wholly circumstantial. The state presented no evidence which overtly reflected on appellant's intent. Thus, the evidence is subject to alternative conclusions; one, that the

shooting was perpetrated by the appellant to defend himself, and two, that the appellant intended to cause the victim's death with no justification.

In such a situation the proof of the element of intent can be confusing to the jury. While the State still has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, the jury is likely to cast the burden on the one claiming the defense. Thus, if the defendant fails to prove that it was absolutely necessary for him to defend himself, the jury is likely to return a verdict of guilty. In effect, the defendant has been forced to assume the burden of proof. The alternative reasonable hypothesis instruction helps to alleviate this confusion by emphasizing to the jury that they must acquit the defendant if his conduct can be explained on a ground other than guilt. It was therefore improper, under the facts of this case, for the trial court to deny the giving of such an instruction.

#### POINT IV

#### THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DENIED BY THE CUMULATIVE ERROR COMMITTED BY THE TRIAL COURT.

Each of the errors in the preceeding points constitutes prejudicial error that would require a reversal of the judgment of the court below. But these errors must also be considered to have had a cumulative effect on the outcome of the trial. The giving of an improper instruction, combined with the

refusal of the trial court to submit appellant's proffered instructions, operated to prejudice the appellant in the presentation of his defense. Appellant's right to a fair and impartial trial was irreparably damaged, and for such error he is entitled to a new trial. State v. St. Clair, 3 Utah 2d 230, 282 P.2d 323 (1955).

#### CONCLUSION

Appellant respectfully submits that the individual and cumulative errors stated herein require reversal of the jury verdict and the judgment entered thereon. The appellant asks this court to grant him a new trial in the Third Judicial District Court.

DATED this \_\_\_\_ day of June, 1980.

Respectfully submitted,

F. JOHN HILL  
Attorney for Defendant-Appellant